

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
)  
Inquiry Concerning the Deployment of )  
Advanced Telecommunications )  
Capability to All Americans in a )  
Reasonable And Timely Fashion, and )  
Possible Steps to Accelerate Such )  
Deployment Pursuant to Section 706 )  
of the Telecommunications Act of 1996 )

CC Docket 98-146 /

**REPLY COMMENTS OF EARTHLINK, INC.**

EarthLink, Inc. ("EarthLink"), by its counsel, submits these Reply Comments in the above-referenced proceeding to stress the important role of the FCC to ensure advanced telecommunications capability is offered in a nondiscriminatory and efficient manner to all Americans. EarthLink is one of the largest Internet Service Providers ("ISPs") in the United States today, providing Internet access services to approximately 4.8 million residential and small business customers. Significantly, over 350,000 EarthLink customers have broadband Internet connections, and of these, the majority are via high-speed Digital Subscriber Line ("DSL") services that use the networks of incumbent and competitive local exchange carriers. As such, EarthLink has considerable experience with the terms of service and provisioning practices of telecommunications carriers offering advanced telecommunications, including carrier DSL services as an input to broadband Internet access service.

Independent ISPs play a significant role in the provisioning of advanced services to end-user customers and to the achievement of the goals of Section 706 of the 1996 Act. It is the ISPs that actually market high-speed information services to the American public; ISPs generally

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obtain the advanced services as a telecommunications service input through a volume contract (or tariff) with the carrier. Thus, whether advanced services are, in fact, deployed to the American public depends greatly on the diversity of ISP service offerings, the availability of broadband telecommunications to ISPs, and the overall competitiveness of the ISP market. The American public is fortunate to find that thousands of independent ISPs are producing a wealth of different service offerings, niche products, and competitive practices to encourage consumer acceptance of high-speed services. It is unfortunately also a reality in today's market that independent ISPs have almost no choice as to the supplier of the broadband telecommunications input. ISPs rely almost exclusively on incumbent LECs' supply of volume-based ADSL services.<sup>1</sup> Efficient and nondiscriminatory provisioning of the DSL input to ISPs is necessary in order to stimulate demand, keep retail prices at competitive levels, encourage innovative services and ensure widespread deployment of advanced services to the American public. The practical reality, however, is that efficient and nondiscriminatory provisioning is often not in the business interests of incumbent LECs that also participate in the ISP market.

In reply, therefore, EarthLink strongly disagrees with the comments of some incumbent LECs calling for less oversight and common carrier regulation of their advanced telecommunications. The FCC's common carrier obligations and bedrock principles delineated in the Computer III decisions (equal access, nondiscrimination, and efficient unbundling) are fundamental to a continued vitality of advanced services for all Americans. EarthLink cannot agree with the comments of incumbent LECs<sup>2</sup> that abandoning common carrier and FCC

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<sup>1</sup> While EarthLink has also begun to offer high-speed service via cable facilities, it is by no means a ubiquitous or ready alternative even for EarthLink to the incumbent LEC's DSL service.

<sup>2</sup> See e.g., Comments of SBC Communications Inc. (filed September 24, 2001) ("SBC Comments"); Comments of Verizon on the Third Notice of Inquiry (filed September 24, 2001); Comments of Qwest Communications International Inc. (filed September 24, 2001).

regulations prior to the introduction of robust competitive local carrier alternatives is sound policy. Common carrier obligations in the FCC's precedent and the market-opening provisions of the Telecommunications Act of 1996 enhance the ability of all providers, including carriers and ISPs, to deliver a diversity of advanced services to the American public. It would defeat the statutory scheme and pro-competitive goals of Section 706 for the Commission to forbear or "loosen up" at this time on the incumbent LECs' obligations regarding advanced services.<sup>3</sup> Incumbent LEC profits are not a proxy for the public good, particularly where those entities engage in actions to impede competitors from offering advanced services to the public.

ISPs have already amply demonstrated in the Commission's Computer III Refresh proceeding<sup>4</sup> that incumbent LECs and their data affiliates offering DSL have significantly hampered the introduction and proliferation of advanced services. ISPs have shown that, among other things, incumbent LEC DSL practices include anticompetitive pricing, failure to provide DSL services to competing ISPs, and discriminatory provisioning that favors incumbent LEC-affiliated ISPs.<sup>5</sup> The Commission can "vigorously promote a competitive marketplace" and ensure "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely manner"<sup>6</sup> only if the dominant supplier of the DSL input, the incumbent

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<sup>3</sup> From the beginning of the investigation of the legal and regulatory status of advanced services, the FCC has held correctly that advanced telecommunications are and should be subject to the Act and pro-competitive Commission precedent. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24012, 24030 (¶37) (1998) ("BOCs are permitted to offer information services on either an integrated basis, i.e., through the regulated telephone company [under Computer III], or through a [Computer II] separate affiliate"); *id.*, at 24017 (¶ 11) ("the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services").

<sup>4</sup> "Further Comment Requested to Update and Refresh Record on Computer III Requirements," CC Docket No. 95-20, 98-10, DA 01-620 (rel. March 7, 2001).

<sup>5</sup> See e.g., Reply Comments of Texas Internet Service Providers Association, CC Docket No.s 95-20, 98-10 (filed April 30, 2001); Reply Comments of United States Internet Service Providers Alliance, CC Docket No.s 95-20, 98-10 (filed April 30, 2001); Reply Comments of the California Internet Service Providers Association, Inc., CC Docket No.s 95-20, 98-10 (filed April 30, 2001).

<sup>6</sup> Notice of Inquiry, CC Docket No. 98-146, FCC 01-223, at ¶ 1 (rel. August 10, 2001).

LEC, provides DSL in an efficient and nondiscriminatory manner to all ISPs. Therefore, the FCC must not abandon appropriate common carrier regulation and oversight of the incumbent LECs, but rather, the FCC must better enforce existing incumbent LEC obligations so that ISPs can expeditiously deliver a broad range of innovative high-speed services to their customers.

While the SBC Comments (at 10) assert that SBC's ADSL is "subject to the full panoply of Title II common carrier regulation . . . even tariff requirements," SBC has in practice chosen largely to ignore its carrier obligations, preferring instead to propound its own policy arguments. Its advanced services affiliate, SBC-ASI, did not offer advanced services under tariff until September 2001 and then asserted that it could and should do so only without dominant carrier tariff requirements.<sup>7</sup> Thus, it is unclear how SBC could bluster in this proceeding that "tariff requirements" are impeding its advanced services roll out. Further, while the "growth of the services and the availability of choice" are laudable goals raised by SBC,<sup>8</sup> the practices of SBC inhibiting ISP competition and deployment of high-speed services frustrate those goals. Indeed, the diversity and proliferation of high-speed services depend significantly on the FCC's carrier obligations and rigorous FCC enforcement.

Of most immediate public interest concern is whether the terms of SBC's recent DSL and advanced services tariff will impede further the introduction of diverse advanced services. Several parties have urged the FCC to investigate the provisions of the tariff that threaten to seriously impair the ability of competitive carriers and ISPs to offer high-speed services to the public.<sup>9</sup> Rather than seeking to differentiate its service offering on price and service quality,

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<sup>7</sup> Request for Special Permission, SBC Advanced Solutions, Inc. Application No. 1 at 1 (filed August 31, 2001) (SBC-ASI insists "that it remains a non-dominant carrier").

<sup>8</sup> SBC Comments at 11.

<sup>9</sup> See Letter to FCC Chairman Michael Powell from EarthLink, Inc., CompTel, Virginia ISP Association, and U.S. Internet Service Providers Alliance (filed September 17, 2001); Petition and Application of the Texas Internet Service Providers Association (filed September 13, 2001); Letter to Magalie Roman Salas, FCC from Frank Simone,

SBC by tariff *raises* ADSL rates to ISPs in all SBC regions by 15% without any cost support for the rate hike,<sup>10</sup> even at a time when SBC asserts that DSL costs “have declined more than 25 percent since the fourth quarter of 2000.”<sup>11</sup> The tariff also announces that SBC has degraded the technical configuration of the service to deny ISPs the ability to offer a virtual private connection to end-users, which offers higher quality connections to Internet-based services.<sup>12</sup> The SBC tariff terms would also seek to destroy the ISP-customer relationship, by providing SBC with the exclusive right to sell “multiple applications” to the ISP’s customer without the ISP’s consent and, in so doing, degrade the quality and throughput of the ISP’s service.<sup>13</sup> The SBC tariff also illegally excludes ISPs from purchasing certain remote LAN DSL services,<sup>14</sup> and thus cordons off a significant segment of the business market for data and Internet-based services exclusively for SBC. Clearly, the tariff underscores that SBC and presumably other incumbent LECs recognize that they do, indeed, have the ability to dictate rates, terms and conditions unconstrained by a competitive alternative for ISPs.

EarthLink strongly urges the Commission to act now to ensure that common carrier principles of access and nondiscrimination are more vigilantly enforced as ADSL services are deployed, so that independent ISPs can offer high-speed services in competition with the incumbent LECs. A failure to enforce common carrier obligations in advanced services,

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AT&T (filed September 20, 2001); Letter to Dorothy Attwood, FCC, from Robert Lopardo, WorldCom (filed September 19, 2001).

<sup>10</sup> SBC-ASI Tariff No. 1, § 6.6.

<sup>11</sup> SBC Investor Briefing, No. 226 at 5 (July 25, 2001), available at, [http://www.sbc.com/Investor/Financial/Earning\\_Info/docs/2Q\\_IB\\_FINAL\\_Color.pdf](http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf).

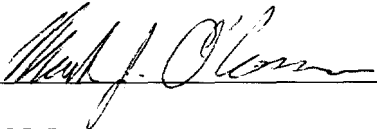
<sup>12</sup> SBC-ASI Tariff No. 1, §§ 6.1.1, 6.2.5 (“Company only provides UBR service.”).

<sup>13</sup> SBC-ASI Tariff No. 1, § 6.1.1, 6.2.1 (“Actual data transfer or throughput may be lower than sync-rate due to . . . end-user use of multiple applications and related services . . .”), 6.2.5.

<sup>14</sup> SBC-ASI Tariff No. 1, § 7.1.1 (service for business end-users and “is not used as a means to facilitate the sale of another service which is not a telecommunications service (e.g. information service).”)

however, is certain to lead to less diversity of service offerings to the public, less competitive pricing of services, and a less fulsome implementation of the goals of Section 706 of the Act.

Respectfully Submitted,

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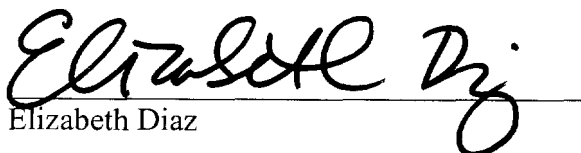
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